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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 196[illegible]

No. [illegible] 153

VAPOR BLAST MANUFACTURING COMPANY,
a Wisconsin business corporation,
Defendant and Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Plaintiff and Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Vapor Blast Manufacturing Company, a Wisconsin business corporation, defendant below, prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Seventh Circuit, issued March 20, 1961, based on the opinion of said Court dated February 28, 1961.

OPINIONS BELOW

The opinion of the Court below (Appendix I-b hereof), is reported in 287 Fed. (2d) 402.

The earlier decision on the within matter was found in 280 Fed. (2d) 305 and is set forth in Appendix I-c. Certiorari was denied in that case on December 5, 1960, 364 U. S. 310.

JURISDICTION

The decree of the court below (Appendix I-a), was entered on March 20, 1961. Such decree was based on 29 USCA Sec. 160(e) set forth in the Appendix. The jurisdiction of this court is invoked under 28 USCA Sec. 1254(1) set forth in Appendix hereof, infra.

QUESTIONS PRESENTED

1. *Whether* secrecy rules 102.94 and 102.95 of National Labor Relations Board *per se* denied to a party due process in an unfair labor charge proceeding before the Regional Administrator at the preliminary investigation and settlement stage, as well as at the formal hearing stage before a Hearing Officer on a formal complaint issued on such charges because of employer's failure to settle such charges not satisfactorily denied by said employer.

2. *Whether* denial by Regional Administrator of employer's formal demand at investigation and settlement stage to inspect under F.R.C.P. Rule No. 34, September 1958, Membership Cards and Constitution and By-laws of newly organized Independent Union claiming to represent majority of employer's shop employees, (the non-recognition of which by September 10, 1958 was the primary basis of alleged unfair labor practices which records Regional Administrator kept secret until June 2, 1959 formal hearing on formal complaint), was abuse of his discretion vested in him by affirmative National Labor Relations Board rules 101.1 and 101.4-8.

3. *Whether* quashing on June 2, 1959 of subpoena *duces tecum* of National Labor Relations Board employees by Hearing Officer at opening of formal hearing

on complaint of unfair labor practice but prior to testimony by any witness having given statement during preliminary investigation stage in which statements September 1958 Union Membership Cards and Union Constitution and By-laws adoption were testified to, (from proof of existence of organization of Independent Union and whether majority of shop employees in fact had joined same), was *per se* a denial of procedural due process.

4. *Whether* petitioner's motion under F.R.C.P. Rule 12 to dismiss charge proceedings because of non-compliance by Regional Administrator with affirmative rules 101.4 to 101.8 requiring full investigation by him before initiating settlement negotiations, the failure of which resulted in the formal complaint of unfair labor practices being issued, was denial of due process.

5. *Whether* Court of Appeals should have required National Labor Relations Board to have included in Appeal Court record, docket and record of preliminary investigation on October and November, 1958 and January 1959 charges leading up to issuance of complaint and opening of hearing at Milwaukee on June 2, 1959 as duly moved for by petitioner.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended to September 14, 1959, and found in 29 USCA, Sections 156 and 160(b),(e) and (f), and Section 526, are set forth in Appendix II, infra. 5 USCA, Sec. 22 is also set forth in the Appendix as is the Fifth Amendment to the U. S. Constitution, and 28 USCA, Sec. 1254.

RULES AND REGULATIONS INVOLVED

The pertinent rules and regulations of the National Labor Relations Board involved are 29 CFR, Sections 101.1 and 101.4, 101.5, 101.6, 101.7 and 101.8 and 102.94 and 102.95, in the form set forth in Appendix III, infra.

The pertinent provisions of the Federal (District Court) rules of Civil Procedure involved herein are found in Rule 12(b), (c), (d), (g), and (h) and Rule 34, and are set forth in Appendix IV, infra.

STATEMENT

Petitioner was and is a business corporation engaged in manufacturing, engineering and sales in interstate commerce from its Milwaukee plant. It produces machinery, parts and supplies for use in connection with finishing machinery manufactured by it under patent licenses.

Five unfair labor charges were filed against it by 5 of its shop employees and an Independent Union organized September 2, 1958 and in which at least a simple majority of the said shop employees were later shown to have earlier signed membership cards therein between September 2, 1958 and September 7, 1958.

By letter received on September 6, 1958 and by oral conference between the attorneys for the Company and the Independent, on September 10, 1958 a demand was made for recognition of such Independent Union and for negotiation of a Collective Bargaining Agreement with it, which was then refused.

At said time the Company was without knowledge of the organization and existence of the Independent Union

and did not believe the allegations that a majority of the shop employees had joined it.

It believed it had outstanding on an annually renewing basis a 1949 contract with Amalgamated Local 575 of the CIO-UAW, Region 10, headquarters at Milwaukee. Subsequently on September 16, 1958 it resumed negotiations with the Business Representative of Local 1092, being the successor Amalgamated Union to Local 575, which also continued in separate existence. Subsequently, in 1958, a State supervised-referendum was held of the shop employees as to the Union shop clause of the new September 16, 1958 agreement with Amalgamated Local 1092 CIO-AFL-UAW, Region 10. At such State-conducted-referendum, the vote of the shop employees was 22 to nothing in favor of the Union shop clause of such new September 16, 1958 UAW-AFL-CIO Amalgamated Local No. 1092 Collective Bargaining Agreement.

The petitioner never recognized the Independent Union.

Of the 5 charging employees Westphal was later rehired; Griffa was later rehired on a part-time basis; while Strutz, Kaleya and Strobel were not rehired, said Kaleya subsequently died while employed elsewhere.

At the June 2, 1959 hearing, the Charter of the Independent Union was introduced as an exhibit and the membership cards were introduced as exhibits. During the preliminary negotiations the employer, petitioner herein, made written demand for the inspection of the statements of the charging parties and documentary exhibits submitted by them in an effort to learn whether the Independent Union was actually organized and whether a majority of the shop employees had joined such Independent Union.

Such information was needed to fully reply to said charges during the investigating stage and to properly evaluate whether the records in the possession of the respondent-appellee might show that such Independent Union had come into actual existence and had acquired membership by a majority of the shop employees of the employer, petitioner herein.

Settlement negotiations were held with the Regional Administrator as a part of such investigation stage of said unfair labor charges, but a settlement was never reached because of a difference of appreciation of the alleged facts which were known but kept secret by the Regional Administrator and demanded but not received, and therefore, disbelieved, by the employer.

The employer duly administratively appealed the denial of its written demand for inspection and thereafter made a motion to dismiss for the Regional Administrator's failure to comply with the full investigation requirements incumbent upon him and on the denial thereof also duly administratively appealed the same to the Office of the General Counsel, who sustained the refusal to allow inspection, or for dismissal.

Preliminary to the June 2-6, 1959 formal hearing, petitioner issued a subpoena *duces tecum* for the documents, but at the opening of the formal hearing on June 2, 1959 was faced with a motion to quash said subpoenas, which was granted by the Hearing Officer.

Petitioner promptly appealed the same to the Chief Trial Examiner of the Washington Office of the appellee but such quashing of said subpoenas was sustained, during the hearing. At such stage of the administrative hearing, the National Labor Relations Board regulations do

not allow judicial review of such administrative adjudications.

The Hearing Officer found the petitioner guilty of certain unfair labor practices based on the restricted record allowed to be made by him. Subsequently the proposed findings of the Hearing Officer were approved by the Board and made the basis of its order against this employer, over the objections of petitioner, which Final Order was sought to be enforced in the Court of Appeals proceeding in which petitioner sought judicial review and judicial relief from the alleged lack of procedural due process.

The Court of Appeals found that there was no *per se* lack of procedural due process and that the secrecy rules of the Board found in Rules 102.94 and 102.95 were within the discretion of the said Board and that petitioner, notwithstanding its extensive efforts at attempting to obtain inspection, had not done so in a specific enough manner and had not sought a recess in the Hearing, notwithstanding the records show that the petitioner had exhausted all of its administrative review remedies in a timely manner. Petitioner had been thwarted in seeking prompt judicial review by independent District Court equitable action because it therein could not show irreparable injury before the Final Order of said Board.

The Court of Appeals did not indicate as to what might have been gained by a recess, which petitioner did not request, at the hearing. The Court of Appeals concluded that the Board was justified in making such secrecy rules in aid of its investigations and to prevent possible retaliation by employers generally. No showing was made that any retaliation had been attempted by petitioner against its shop employees, who were disclosed,

at the June 2-6, 1959, hearing, to have signed membership cards in the short-lived Independent Union, between September 2, 1958, and September 7, 1958.

(The record of the Board of its preliminary proceedings, which petitioner sought to have certified to the Court of Appeals, but which was not ordered to be returned to the Court of Appeals, would have disclosed the dates of the settlement negotiations and the administrative procedure on petitioner's motions for inspection and for dismissal and the administrative appeals thereon to the office of the General Counsel.)

REASONS FOR GRANTING WRIT

1. **The decision of the Court below is in conflict with the decisions of this Court.**
2. **The decision of the Court below is in conflict with decisions of other Courts of Appeals.**
3. **The decision of the Court below is not effective of the applicable statutes.**
4. **The case is of the utmost importance to the administration of the National Labor Relations Act.**

Petitioner contends that there are special and important reasons for the granting of its petition for writ of certiorari herein under the Statutes applicable thereto and under the rules of this Court therefor, as a matter of sound judicial discretion:

The question presented here is of obvious importance in administration of the National Labor Relations Act.

Certiorari Should Be Granted in This Proceeding Where Important Question of Government Privilege To Resist Discovery Is Involved.

U. S. v. Reynolds et al. (1953) 345 U.S. 1 (Construing FRCP Rule 34), (28 USCA and 5 USCA, Sec. 22)

At page 9 the Court said:

"Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."

(See annotation to above case in 97 L. Ed. 735)

See also: *Gordon v. U. S.* (1953) 344 U.S. 414, 420

The petitioner contends that the erroneous conclusion of the Court below is set forth in that portion of its decision which reads as follows:

"Examination of Board documents is restricted by the regulations set out, *supra*, unless the Board consents to production or until after a witness has testified and is subject to impeachment. We hold that these two regulations are not, *on their face*, violative of the constitutional guarantee of procedural due process. The Board possesses the broad power to make rules to guide the internal administration of the agency. It has determined that it is necessary to proper administration to stamp as confidential all documents in its possession. The confidentiality of employee affidavits may well be necessary to preclude employer retaliation and to insure full disclosure to field examiners. The Board's practice does not, *per se*, preclude respondent's right to a fair hearing. * * *

"On the issue of statutory interpretation, we hold that the language in Section 10(b) of the Act, *supra*, relating to the 'rules of evidence,' does not require the Board to adopt the entire discovery procedure

contemplated by the Federal Rules of Civil Procedure. Even if 'rules of evidence' is interpreted to mean 'rules of procedure,' it is in the first instance the responsibility of the Board to formulate its own rules for unfair practice hearings and to determine whether full discovery is 'practicable' in such hearings. This is not to say that in certain instances, the *administration* of such rules might not be an abuse of discretion, providing a party made sufficient showing of 'need' for the pre-trial production of documents in Board possession. • • •

"However, we face no such situation here. Neither before the Board nor here has respondent demonstrated a 'need' to examine the documents in question before the administrative hearing except by broad statements that such examination was necessary in its preparation for the unfair practices hearing. Respondent has not shown it was prejudiced, surprised or in any way put at a disadvantage because of the operation of the Board's regulation. At no time did it ask for a continuance. We conclude that there was no abuse of discretion in the Board's adherence to its rules of practice."

• • •

The Decision of the Court Below Is in Conflict With Decisions of Other Courts of Appeals and Is Not Effective of Intervening Amendatory Legislation Applicable Thereto.

The Court decisions relating to discovery procedure before the National Labor Relations Board are both indefinite and in conflict.

The reported cases are:

Biazevich v. Becker (1958) (D.C. S.D. Cal.) 161 Fed. Supp. 261

NLRB v. Adhesive Products Corp. (1958) (2nd Cir.) 258 Fed. (2d) 403

NLRB v. Chambers Mfg. Co. (1960) (5th Cir.) 278 Fed. (2d) *715*, 716

NLRB v. General Armature & Mfg. Co. (1951) (3rd Cir.) 192 Fed. (2d) 316

NLRB v. Globe Wireless, Ltd. (1951) (9th Cir.) 193 Fed. (2d) 748, 751

NLRB v. Quest-Shon Mark B. Co. (1950) (2nd Cir.) 185 Fed. (2d) 285, 289, 290

NLRB v. Jamestown Sterling Corp. (1954) (2nd Cir.) 211 Fed. (2d) 725

NLRB v. Phillips Gas & Oil Co. (1944) (3rd Cir.) 141 Fed. (2d) 304, 306

NLRB v. Thayer Co. (1954) (1st Cir.) 213 Fed. (2d) 748, 758

NLRB v. Vapor Blast Mfg. Co. (1961) (7th Cir.) 287 Fed. (2d) 402

Raser Tanning Co. v. NLRB (6th Cir.) (1960) 276 Fed. (2d) 80

Thompson Products Inc. v. NLRB (1943) (6th Cir.) 133 Fed. (2d) 637

Vapor Blast Mfg. Co. v. Madden et al. (1960) (7th Cir.) 280 Fed. (2d) 205

(Certiorari denied Dec. 5, 1960; 364 U.S. 310)

The language of the above reported thirteen U. S. District Court and U. S. Court of Appeals cases, as to the right of a litigant before the National Labor Relations Board to any inspection of essential exhibits or documents in the file of said litigation, until after the conclusion of the testimony of a witness furnishing such

exhibit or document at a formal hearing of an adversary complaint proceeding (after failure of settlement negotiations during the investigation stage of such unfair labor charge matter, when such documents and exhibits would be useful) is outmoded by being in settings of obsolete background facts due to related legislative changes.

The only concession these decisions made to the principle of *Jencks v. U. S.* (1957) 353 U.S. 657, is to allow inspection for the limited purpose of impeachment after the testimony of a specific witness furnishing such testimony or documentary exhibit.

Such cases deny any vitality to the 1947 Taft-Hartley Act Amendments to 29 USCA Sec. 156 and to 29 USCA 160(b).

Such cases disregard the 1959 amendment making the Administrative Procedure Act applicable to adjudication other than the "final Order" reviewable according to 29 USCA 160(e) or (f). The 1959 amendment is found in 29 USCA 526.

That followed the 1958 amendment against secrecy of official records found in 5 USCA 22.

These cases disregard the principles set forth in 1959 in *Green v. McElroy*, 360 U.S. 477.

These cases also disregard the principles set forth in 1947, in *Hickman v. Taylor*, 327 U.S. 495, 507.

There is no direct Supreme Court resolution of the "due process" issue involved in the above National Labor Relations Board procedural matters.

These cases are from seven of the eleven Courts of Appeal.

It is petitioner's contention that in the instant case the Court of Appeals abdicated its judicial control to the National Labor Relations Board, in not holding that in this non-military and non-diplomatic case, that *per se* the Rules of the National Labor Relations Board, 102.94 and 102.95 *per se* deprived petitioner of procedural due process of law.

BOARD AND ITS AGENCIES DENIED PETITIONER DUE PROCESS INVESTIGATION, MEDIATION AND HEARING.

Administrative actions herein disregarded *Hickman v. Taylor*, 329 U.S. 495 (1947), respecting discovery and *Green v. McElroy*, 360 U.S. 477 (1959), respecting confrontation and cross-examination of witnesses.

Notwithstanding the provisions of 29 USCA Sec. 156, and notwithstanding the provisions of 29 USCA Sec. 160(b), and notwithstanding the provisions of the rules and regulations duly promulgated by the National Labor Relations Board and applicable to the respondent's Regional Administrator Ross M. Madden herein, as are found in 29 CFR 101.4, 101.5, 101.6, 101.7 and 101.8, the petitioner was denied the right to inspect and copy the affidavits of witnesses and the documents submitted by said witnesses in support of the charges of unfair labor practices being investigated by said Regional Administrator, Ross M. Madden, so that said petitioner was unable to fully reply thereto and so that said Regional Administrator could make a "full investigation" as imposed upon him before the issuance of the unfair labor practice charge complaint on said charges as was imposed upon him by 29 CFR 101.4-8, and so that a reasonable effort at compromise thereof could be entered into, as

was imposed upon the Regional Administrator and the petitioner by said rules.

The jurisdictional requirement upon said Regional Administrator in issuing a formal administrative complaint of unfair labor practices against an employer required the compliance by said Regional Administrator with the provisions of said rules found in 29 CFR 101.1 and 101.4-8, which rules were promulgated by the National Labor Relations Board under the applicable provisions of the Administrative Procedure Act, 5 USCA 1001-11.

Said Rule 29 CFR 101.1 expressly sets forth that such rules were issued to comply with the provisions of the Administrative Procedure Act.

These rules supplement and qualify the provisions of 29 USCA 160(b) which authorize the issuance of a complaint on substantially supported charges of unfair labor practices.

Such interpretive rules promulgated by the National Labor Relations Board as are found in 29 CFR 101.1 and 101.4-8, are a jurisdictional requirement upon a Regional Administrator to receive and investigate, consider and attempt to settle charges of unfair labor practices as a conditional prerequisite to the issuance of a formal adversary administrative complaint, authorized to be issued under 29 USCA, Sec. 160 (b).

Until the issuance of a formal complaint authorized under 29 USCA Sec. 160 (b), before such matter can become an adversary proceeding of the public against the petitioner herein, the authority of a Regional Administrator is prescribed by said rules and regulations

found in 29 CFR Chapter 101, and such Regional Administrator is an investigator and mediator thereof in the interests of labor management peace and in the interest of unburdened interstate commerce.

The investigation and mediation under said rules found in 29 CFR 101.1 and 101.4-8, by the Regional Administrator of the verified charges of private parties seeking to invoke the formal assistance of the National Labor Relations Board is mandatory upon said Regional Administrator to his jurisdiction under the Statutes and rules he is authorized to operate under.

His right and duty to issue a complaint under 29 USCA 106 (b) upon such private charges of alleged unfair labor practices is not absolute. His right to issue such a formal administrative complaint is not an unbridled discretion but is subject to his precompliance with the interpretive Administrative Procedure Act rules found in 29 CFR 101.1 and 101.4-8.

Labor management peace in interstate commerce, which Congress has generally described in its Declaration of Public Policy in 29 USCA 151, is also a limitation upon the powers and duties of a Regional Administrator and prescribe and restrict the purposes of the provisions of 29 USCA Sec. 160 (b) respecting the authority to issue an administrative complaint of unfair labor practices.

The purpose of Congress in expressly providing in 29 USCA Sec. 160 (b) (last sentence) for the application where practicable in such proceedings as are authorized in 29 USCA Sec. 160 (b) for the Federal Rules of Civil Procedure, should not be limited in application to proceedings subsequent to the issuance of a complaint under

29 USCA Sec. 160 (b) but also be applicable to the preliminary and jurisdictional steps to the issuance of such formal administrative complaint by a Regional Administrator of the National Labor Relations Board who is an arm of the office of the general counsel of the National Labor Relations Board since the 1947 Taft-Hartley Act amendments of the Wagner Act. This is especially apparent since the Administrative Procedure Act provisions found in 29 USCA Sec. 156, were also included by said 1947 Taft-Hartley Act amendment. Similarly, said interpretive rules and regulations found in 29 CFR 101.1 and 101.4-8 were promulgated by the National Labor Relations Board in consequence of said 1947 amendment of 29 USCA, Sec. 156.

Thus it is apparent that the rules and regulations found in 29 CFR 101.1 and 101.4-8 are prerequisite to the jurisdiction of the Regional Administrator to the issuance of the complaint against the petitioner herein. Petitioner in the Court of Appeals sought relief from his disregard of said rules and regulations in denying petitioner the rights of inspection and "full investigation" by such Regional Administrator to obtain the benefits of the prescribed investigation and mediation efforts imposed by such rules upon Regional Administrators as a jurisdictional prerequisite to issuing his formal complaint.

Not withstanding the fact that persons may have no practical recourse for being subjected to unfounded, expensive and tedious litigation, whether administrative or judicial, if the denial by such Regional Administrator of petitioner's right to inspect and copy the investigationary records sought to be inspected so that the employer could participate in a Regional Administrator's investigator making a full investigation and reasonable efforts at settlement and mediation based on such Regional

Administrator having the maximum available pertinent facts, from a full investigation. It is petitioner's contention that such administrative denial, after exhaustion of administrative appellate procedure which the record discloses, was such an "adjudication" for which petitioner is entitled to judicial review by this Court as sought by petitioner in its civil action prematurely sought to be instituted.

(One premise of petitioner was that the laws and regulations referred to entitled petitioner to commence a civil action to enforce the Regional Administrator's compliance with the rules, regulations and statutes as had been sought in the U. S. District Court in the earlier litigation in which certiorari was denied on December 5, 1960.)

Reasonable men having the same or similar facts, usually come to similar conclusions respecting the significance of such facts. This is the basis for the entire anti-secrecy theory of Federal Court civil litigation obtained by the Federal Rules of Civil Procedure.

The Congressional application of the use of these Federal Rules of Civil Procedure has been disregarded by the Regional Administrator and the Board and its general counsel, as shown by the instant record.

This *per se* denied petitioner the due process right of confrontation and cross-examination of the witnesses as to the facts of inception and existence of the independent Union and whether a majority of the petitioner's shop employes were members of it, whose affidavit testimony and documentary exhibits in the possession of the Regional Administrator at a critical stage of labor peace and mediation has been denied to petitioner when it duly sought the same, and exhausted the administrative

remedies provided in connection therewith and did not waive the same.

The previous decision of the Court of Appeals on this issue between the parties is found in the Court of Appeal's decision in Appeal Cause No. 12869, and decided by it on June 30, 1960, and was reported in Volume 280 Fed. 2d, 205. (See Appendix I-c) On December 5, 1960, certiorari was denied. 81 Sup. Ct. Reporter 273 (No. 447) 364 U.S. 310. Petitioner reasserted such position in the review of the final order of said proceedings.

B. In addition petitioner contends that the refusal of the hearing officer to grant the inspections at the opening of the hearing on June 2, 1959 at Milwaukee, set forth in the transcript and the action of the hearing officer in having granted respondent's motion to quash the subpoenas issued by petitioner to obtain said statements and exhibits at the opening of the hearing to aid petitioner in the preparation of its defense was reversible error and *per se* denied petitioner procedural due process.

The record will show that petitioner, both previous to and in said formal complaint hearings, exhausted its administrative review rights, which *per se* left petitioner denied due process in consequence of the secrecy rules and regulations of the respondent.

While respondent modified its rules and regulations somewhat after the decision of the U. S. Supreme Court in *Jencks v. United States,* 353 U.S. 657 (1957) it is petitioner's contention that the effect of the revised secrecy rules and regulations of the respondent do not comply with the Supreme Court rules in *Jencks v. United States* and subsequent cases.

Just as the Supreme Court in the *Jencks v. U.S.* case, *supra,* stated that the attorneys for both parties were en-

titled to inspection of documents rather than merely the District Judge since the attorney for the defendant was best qualified to be able to detect relevancy and materiality in the statements (later separately to be considered) as evidence, so here it is fair to state that the refusal of the Regional Director of the National Labor Relations Board to honor Rule 34 of the FRCP (29 USCA) at the initial record hearing on affidavit evidence constitutes improperly refusing to apply Rule 34, since it is practicable to do so.

The instant records show that petitioner, in the instant case, properly made its demands, issued its subpoena and made its record of demand for inspection to witnesses having custody of the exhibits, but that petitioner was again denied the same.

Petitioner contends that at two critical points in the instant case, it was denied due procedural rights provided for it by Congress:

(a) When it could not determine the facts of the existence of the independent union and how many members it had and the relation thereof to the Teamsters Local 158, which also made a demand for recognition as representing the charging parties at the preliminary mediation and settlement stage of the charges by the disregard by the regional administrator of petitioner's motion and request for such information.

(b) At the hearing this petitioner was not able to meet factual issues of exhibits and documents until after the same were first offered in evidence for identification by a general counsel witness already on the stand.

Petitioner earnestly contends that if it had obtained the facts at the preliminary stage then available from respondent's files, it would have been guided by such facts.

Petitioner also contends that if it had the exhibits and documents before, or at least at the opening of the hearing, it could have made a better defense to the charges which were heard over a four-day period.

The refusal of the motion to inspect at the preliminary settlement stage denied this petitioner the documentary evidence of the actual September 2, 1958, organization of a new or inchoate independent union and prevented this petitioner from record facts secreted in the respondent's file, first introduced at the formal hearing between June 2 and June 6, 1959, that a numerical majority of petitioner's shop employees had signed membership cards in such independent union between September 2 and September 8, 1958.

The five charges under investigation were filed on October 13 and November 6, 1958, and on January 29, 1959.

The printed Appendix of the NLRB filed in the Court of Appeals and the Supplemental Appendix attached to the employer's brief in the Court of Appeals was sought to be supplemented by this petitioner's motions returnable before the Court of Appeals at the oral argument on January 31, 1961.

At the conclusion of the decision of the Court below it stated as follows:

> "We deny respondent's motion, made before this court and taken with the case, to expand the record before us to include material which had not been considered by the Board."

This denied petitioner due process under 29 USCA 160 (e), as well as under 28 USCA 2112 and under Rule 14 of the Court of Appeals for the Seventh Circuit.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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Dated: June 15, 1961

APPENDIX I-a

DECREE OF UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case No. 13149 (Dated and filed March 20, 1961)

United States Court of Appeals for the Seventh Circuit, Case No. 13149, National Labor Relations Board, petitioner, vs. Vapor Blast Manufacturing Company, respondent.

DECREE

Before: Hastings, Chief Judge, Knoch, Circuit Judge and Mercer, District Judge.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Vapor Blast Manufacturing Company, its officers, agents, successors and assigns on January 12, 1960. The Court heard argument of respective counsel on January 31, 1961, and has considered the briefs and transcript of record filed in this cause. On February 28, 1961 the court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Seventh Circuit the said order of the National Labor Relations Board in said proceeding be enforced, and that Vapor Blast Manufacturing Company, its officers, agents, successors and assigns abide by and

perform the direction of the Board in said order contained.

(s) John S. Hastings

Judge, United States Court of Appeals for the Seventh Circuit

(s) Win G. Knoch

Judge, United States Court of Appeals for the Seventh Circuit

Kenneth J. Carrick

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX I-b

DECISION OF COURT OF APPEALS FOR SEVENTH CIRCUIT

Dated and filed February 28, 1961

In the United States Court of Appeals for the Seventh Circuit, September Term 1960 - January Session, 1961, No. 13149, National Labor Relations Board, Petitioner, vs. Vapor Blast Manufacturing Company, Respondent On Petition for Enforcement of an Order of the National Labor Relations Board.

February 28, 1961

Before HASTINGS, *Chief Judge*, KNOCH, *Circuit Judge*, and MERCER, *District Judge*.

HASTINGS, *Chief Judge*. The National Labor Relations Board (Board) has petitioned this court for enforcement of its order issued against respondent Vapor Blast Manufacturing Company (respondent). The Board found that respondent had violated Section 8(a)(3) and (1) of the Labor-Management Relations Act, 1947, the Act), 29 U.S.C.A. § 158, by discharging two employees because of their leadership in forming a union of respondent's employees, the Vapor Blast Independent Shop Worker's Association (Independent); further that it had violated Section 8(a)(1) by discharging three other employees because of their participation in concerted activities and by interrogating an employee about his and fellow employees' union activity; that it had violated Section 8(a)(5) and (1) by refusing to recognize and bargain with Independent which was the authorized representative of its employees; and finally that it had violated Section 8(a)(2) and (1) by assisting and supporting the In-

ternational Union, United Automobile Aircraft and Agricultural Implement Workers of America, CIO (UAW). 126 NLRB No. 6, 45 L.R.R.M. 1271 (1960).

A brief resume of the facts sustains the Board's contention that its findings were supported by substantial evidence.

Respondent's factory at Milwaukee, Wisconsin, produces liquid honing machines (devices for finishing rough parts) and related products. In 1949, respondent entered into a collective bargaining contract with Local 575, UAW. The Board found that such local had been defunct in respondent's plant since 1951 because none of the employees were members or had paid dues to the local since that date; because there was no correspondence or bargaining between Local 575 and respondent from 1951 to 1958; and because respondent admitted that between 1950 and 1958 it unilaterally determined hours of work, wage increases and layoffs.

In early August, 1958, there was agitation among respondent's employees for a general pay increase. Employee Strutz, chairman of the informal committee chosen to present the demand to respondent's officials, met with respondent's president. The latter refused to meet with the committee, called Strutz an "instigator and troublemaker," cursed him, shoved him, and discharged him in a burst of intemperate language. Upon hearing of Strutz's discharge, the remainder of the shop employees walked out and began picketing the plant. Subsequently, in accordance with respondent's agreement to negotiate with the committee, all employees, including Strutz, returned to work.

A number of bargaining sessions were held in August but resulted in no agreement. After negotiations broke

down on September 2, respondent's employees formed Independent, adopted a constitution and by-laws, and elected Strutz chairman and Kaleya treasurer of the organization. On September 4, Independent's counsel wrote to respondent demanding recognition of Independent. At that time Independent possessed signed membership cards from a majority of the employees in the bargaining unit. Respondent did not reply to the letter; its president was advised by counsel "to ignore it."

Soon after the formation of Independent, respondent's officials called in an employee to inquire of the organizational activities. This employee was told that Strutz and Kaleya were going to be discharged for union activity. Two days later these employees were discharged. Respondent contends that the discharge was "for economic reasons."

Because of these discharges, the remaining employees voted to strike. The employees walked out and began picketing the plant. Three pickets — Griffa, Westphal, and Strobel — were discharged because respondent felt that they "participated in an unauthorized picket line."

Finally, respondent's counsel told certain employees to meet with the UAW international representative who had signed the 1949 contract, to see if such agreement was still valid. Respondent's president agreed to recognize the UAW local prior to this suggested meeting. At such meeting the UAW representative agreed to participate in respondent's bargaining negotiations only if the employees signed new UAW membership cards. Seventeen employees, a majority of the unit, signed UAW cards in a two-day period. A new contract was entered into between respondent and UAW which provided, *inter alia,* that employees were required to be members of UAW

and that dues, fines, and assessments levied by that union would be deducted from employees' pay, *i.e.*, "checked off," and paid directly to UAW.

It is clear that there was substantial evidence to support the Board's conclusion that Strutz and Kaleya were discharged because of their leadership in organizing Independent and not "for economic reasons." Respondent has offered a number of explanations why they were discharged, but the Board, weighing the evidence, properly rejected these reasons. *Agwilines, Inc. v. National Labor Relations Board,* 5 Cir., 87 F. 2d 146 (1936); *National Labor Relations Bd. v. Whitin Machine Works,* 2 Cir., 204 F. 2d 883 (1953); *National Labor Relations Bd. v. San Diego Gas & El. Co.,* 9 Cir., 205 F. 2d 471 (1953). Similarly, respondent engaged in an unfair practice by discharging Griffa, Strobel and Westphal for picketing to protest the unfair discharge of Strutz and Kaleya and respondent's refusal to bargain. *N.L.R.B. v. John S. Swift Company,* 7 Cir., 277 S. 2d 641, 646 (1960); *Time-O-Matic, Inc. v. N.L.R.B.,* 7 Cir., 264 F. 2d 96, 102 (1959).

Further, respondent unfairly ignored Independent's request to bargain at a time when it represented a majority of the employees. Upon receiving the demand to bargain, respondent did nothing to inform itself of the status of Independent; it merely ignored Independent. This act plus the other unfair conduct rebuts, as the Board concluded, respondent's defense that in good faith it refused to bargain. *National Labor Relations Board v. Hamilton,* 10 Cir., 220 F. 2d 492, 494 (1955). Finally, respondent unfairly assisted UAW; it did not maintain the "strictly neutral attitude" required by the Act. *Harrison Sheet Steel Co. v. National Labor Relations Bd.,* 7 Cir., 194 F. 2d 407, 410 (1952).

Respondent does not seriously challenge a number of the Board's findings — it cannot since they rest on uncontradicted evidence — but contritely explains that its conduct was due to a lack of familiarity with the Act's requirements and a misapprehension of the status of the defunct UAW local. However, respondent's conduct, whatever its motives, squarely violated the cited sections of the Act.

We now turn to certain procedural issues respondent raises. Its major complaint is that the Board denied it procedural due process by refusing to grant access to affidavits of charging employees upon respondent's demand for discovery. The demands were made in the period of time prior to the issuance of the unfair labor practice complaint and the hearing on such complaint. Respondent attempted to raise this same issue in a direct action in the district court while the instant proceedings were pending before the Board. We affirmed the district court's dismissal of that action because of the failure of respondent to exhaust its administrative remedies. *Vapor Blast Manufacturing Company v. Madden,* 7 Cir., 280 F. 2d 205 (1960), cert. denied, 364 U.S. 910.

Reference to our earlier opinion indicates the series of requests and refusals made prior to the administrative hearing of the unfair practices complaint:

> "In October and November, 1958, six unfair labor practice charges against the Company were filed with Madden, as Regional Director of the Board. Madden commenced an investigation of the charges pursuant to Board rule, 29 U.S.C.A. App. § 101.4. As part of this investigation, certain questions relating to the charges were submitted to several management officials of the Company. Although the questions were answered, the Company contends it was not able to answer fully and fairly because of Mad-

> den's denial of its request to inspect the affidavits of witnesses supporting the charges supplied to and in possession of the Board. On March 24, 1959, an unfair labor practice complaint was issued against the Company based upon the result of the administrative investigation of the charges. Early in May, 1959, the Company appealed to the General Counsel of the Board from Madden's denial of an opportunity to inspect the documents in question and from his additional denial of a motion to dismiss the charges due to insufficient evidence. In addition, the Company applied to the General Counsel for permission to inspect the affidavits considered by Madden in his investigation of the unfair practice charges. On May 25, 1959, the General Counsel rejected the Company's appeal and denied its separate application for inspection." *Id.* at 206.

In addition, the record discloses that on June 2, 1959, at the outset of the hearing, respondent repeated its request for these same affidavits "before the gentlemen testify." The trial examiner sustained the General Counsel's objection stating, "There is no provision for such discovery of such matters."

During the hearing, the General Counsel put on thirteen witnesses other than respondent's officials. Respondent did not request the statements of the first six of these witnesses, three of whom were charging parties. Three of the remaining seven witnesses had given statements. At the conclusion of their examination, respondent's attorney demanded, ***and the General Counsel produced,*** the affidavits these witnesses had given to the field examiner. Respondent's counsel was afforded an opportunity to examine the affidavits before continuing his cross-examination and did not request any additional time.

Respondent's argument made in the prior district court action, which it renews here, has been summarized as follows:

> "The Company's central substantive position is that the denial of inspection of the affidavits in the Board's possession irreparably injured it because of its inability to reply adequately to the charges and the complaint and to prepare fully for the unfair practice hearing. It states that the discovery it seeks is authorized by Rule 34 of the Federal Rules of Civil Procedure, 28 U.S.C.A. and it is noted that Section 10(b) of the Labor-Management Relations Act, 1947, 29 U.S.C.A. § 160(b) (the Act), requires that unfair labor practice proceedings 'so far as practicable [shall] be conducted in accordance with the rules of evidence applicable in the district courts of the United States.' The Company contends that the rules of the Board which allowed the Board to suppress the documents in question here are invalid and unconstitutional. The operation of all these factors, allegedly, deprived the Company of its due process rights to a full and fair proceeding." *Id.* at 206-207.

The Board's practice of closing its files to pre-trial discovery has been traced in these terms:

> "In this and similar actions, parties to Board proceedings have attempted to secure examination of documents in the Board's files. However, in [Section 102.117(b)], 29 U.S.C.A. App., the Board has found confidential and not available to public inspection all evidence collected by the Board (with limited exceptions discussed, *infra*) and all files, documents, reports, memoranda and records pertaining to the Board's internal management or to the investigative stage of proceedings. The rule makes provision for inspection upon the permission of the Board, its chairman, the general counsel, or any regional director. Lacking such permission, Board employees are

> prohibited from producing the files and related documents pursuant to a subpoena *duces tecum* or from testifving as to their contents and are instructed to move to quash such subpoena on the ground that the evidence is privileged against disclosure. See Sections [102.117, 102.118], 102.31 and 102.66, 29 U.S. C.A. App." *Id.* at 207.

Subsequent to the decision in *Jencks v. United States,* 353 U.S. 657 (1957), the Board promulgated a new rule permitting examination of a witness's prior statement for the purpose of impeachment. This regulation states:

> "After a witness called by the general counsel has testified in a hearing upon a complaint under section 10(c) of the act, the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken." 29 U.S.C.A. App. § 102.118.

It was pursuant to this latter regulation that respondent's counsel demanded, and had produced for inspection, the affidavits of the three witnesses, as above mentioned.

Examination of Board documents is restricted by the regulations set out, *supra,* unless the Board consents to production or until after a witness has testified and is subject to impeachment. We hold that these two regulations are not, *on their face,* violative of the constitutional guarantee of procedural due process. The Board possesses the broad power to make rules to guide the internal administration of the agency. It has determined that it is necessary to proper administration to stamp as confidential all documents in its possession. The confidentiality

of employee affidavits may well be necessary to preclude employer retaliation and to insure full disclosure to field examiners. The Board's practice does not *per se,* preclude respondent's right to a fair hearing. *N.L.R.B. v. Chambers Manufacturing Corporation,* 5 Cir., 278 F. 2d 715, 716 (1960); *Biazevich v. Becker,* D.C.S.D.Cal., 161 F. Supp. 261 (1958).

On the issue of statutory interpretation, we hold that the language in Section 10(b) of the Act, *supra,* relating to the "rules of evidence," does not require the Board to adopt the entire discovery procedure contemplated by the Federal Rules of Civil Procedure. Even if "rules of evidence" is interpreted to mean "rules of procedure," it is in the first instance the responsibility of the Board to formulate its own rules for unfair practice hearings and to determine whether full discovery is "practicable" in such hearings. This is not to say that in certain instances, the *administration* of such rules might not be an abuse of discretion, providing a party made sufficient showing of "need" for the pre-trial production of documents of Board possession. See, *National Labor Relations Bd. v. Quest-Shon Mark B. Co.,* 2 Cir., 185 F. 2d 285, 289-90 (1950); *Poinsett Lumber and Manufacturing Company,* 109 NLRB 1079, 1084 (1954).

However, we face no such situation here. Neither before the Board nor here has respondent demonstrated a "need" to examine the documents in question before the administrative hearing except by broad statements that such examination was necessary in its preparation for the unfair practices hearing. Respondent has not shown it was prejudiced, surprised or in any way put at a disadvantage because of the operation of the Board's regulation. At no time did it ask for a continuance. We

conclude that there was no abuse of discretion in the Board's adherence to its rules of practice.

We find no abuse of discretion in the Board's refusal to reopen the proceeding after the Board's order against respondent had issued. We deny respondent's motion, made before this court and taken with the case, to expand the record before us to include material which had not been considered by the Board. *Kearney & Trecker Corp. v. National Labor Rel. Bd.*, 7 Cir., 209 F. 2d 782 (1953).

For the reasons stated, the Board's petition for a decree enforcing its order shall be granted.

ENFORCEMENT ORDERED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX I-c

PREVIOUS SEVENTH CIRCUIT COURT OF APPEALS DECISION IN RELATED CASE

June 30, 1960

280 Fed. (2) 205-209. Certiorari denied Dec. 5, 1960. No. 447 364 U. S. 910 (81 S.C. 273)

United States Court of Appeals, Seventh Circuit, June 30, 1960. Vapor Blast Manufacturing Company, a Wisconsin business corporation, plaintiff-appellant, v. Ross M. Madden, individually and as Regional Director of Region 13, of National Labor Relations Board, and Gerald S. Patterson, individually and as Counsel for the office of the General Counsel of the National Labor Relations Board, Defendants-Appellees. No. 12869

Action for declaratory judgment. From an order of the United States District Court for the Northern District of Illinois, Eastern Division, Julius J. Hoffman, J., the plaintiff appeals. The United States Court of Appeals, Hastings, Chief Judge, held that action for a declaratory judgment by an employer against whom unfair labor charges had been filed seeking to inspect affidavits of witnesses supporting the charges supplied to and in possession of the Board was properly dismissed by the District Court for lack of jurisdiction over the subject matter.

Affirmed.

1. Declaratory Judgment — 113

An action for a declaratory judgment by an employer against whom unfair labor charges had been filed seeking to inspect affidavits of witnesses supporting the

charges supplied to and in possession of the Board was properly dismissed by the District Court for lack of jurisdiction over the subject matter on the ground that the review provisions of the Labor Relations Act provided adequate opportunity for the employer to raise its contention in the enforcement proceeding by putting in issue the question of whether it was deprived of procedural due process by the Board's action of suppressing the documents. National Labor Relations Act, §10(b, e, f) as amended 29 U.S.C.A. §160(b, e, f); Fed. Rules Civ. Proc. rule 34, 28 U.S.C.A.; App. 29 U.S.C.A. Rules & Regulations, §§102.31, 102.66, 102.94(b), 102.95; 28 U.S.C.A. §1337.

2. Labor Relations — 511

The rule requiring exhaustion of an administrative remedy in labor relations proceedings cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that mere holding of a prescribed administrative hearing would result in irreparable damage. National Labor Relations Act, §10 (b, e, f) as amended 29 U.S.C.A. §160(b, e, f).

3. Labor Relations — 664

Determination by the regional director of the Labor Relations Board to file an unfair practice complaint is not an adjudication subject to intermediate judicial review under the Administrative Procedure Act. Administrative Procedure Act, §10(c), 5 U.S.C.A. §1009(c).

Earl A. Glick, Chicago, Ill., Philip L. Padden, H. William Ihrig, Milwaukee, Wis., Milton Gerwin, Chicago, Ill., for appellant.

Stuart Rothman, General Counsel, Elliott Moore, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Duane B. Beeson, Attorneys, National Labor Relations Board, Washington, D. C., for appellee.

Before HASTINGS, Chief Judge, and DUFFY and KNOCH, Circuit Judges.

HASTINGS, Chief Judge.

This is an appeal from an order of the district court dismissing a complaint for declaratory judgment filed by plaintiff-appellant, Vapor Blast Manufacturing Company (Company), against defendants-appellees, Ross M. Madden, individually and as Regional Director of Region 13, National Labor Relations Board (Board), and Gerald S. Patterson, individually and as counsel for the office of the General Counsel of the Board. The basis of the dismissal was that the court had no jurisdiction over the subject matter of the complaint.

The Company is a Wisconsin corporation, located in Milwaukee, engaged in the business of engineering, manufacturing and selling certain equipment, parts and supplies. In October and November, 1958, six unfair labor practice charges against the Company were filed with Madden, as Regional Director of the Board. Madden commenced an investigation of the charges pursuant to Board rule, 29 U.S.C.A.App. § 101.4. As part of this investigation, certain questions relating to the charges were submitted to several management officials of the Company. Although the questions were answered, the Company contends it was not able to answer fully and fairly because of Madden's denial of its request to inspect the affidavits of witnesses supporting the charges supplied to and in possession of the Board. On March

24, 1959, an unfair labor practice complaint was issued against the Company based upon the result of the administrative investigation of the charges. Early in May, 1959, the Company appealed to the General Counsel of the Board from Madden's denial of an opportunity to inspect the documents in question and from his additional denial of a motion to dismiss the charges due to insufficient evidence. In addition, the Company applied to the General Counsel for permission to inspect the affidavits considered by Madden in his investigation of the unfair practice charges. On May 25, 1959, the General Counsel rejected the Company's appeal and denied its separate application for inspection.

Prior to the unfair practice hearing scheduled for June 2, 1959, the Company filed in the district court a petition for a temporary order restraining the hearing. The order was denied because the Company failed to show irreparable injury. In addition, in a complaint for declaratory judgment, the Company asked that the court declare the Company's right to inspect the affidavits in question and, after inspection, to reply to the allegations made therein in the course of what would be, in effect, a review by Madden of the substantiality of the charges. In addition, the Company asked to have the unfair practice complaint held in abeyance during such review.

The unfair practice hearing was held as scheduled. The case has progressed within the administrative framework of the Board; and on January 12, 1960, the Board issued its decision finding that the Company had committed certain unfair labor practices and requiring appropriate remedial action. Vapor Blast Manufacturing Co., 126 NLRB No. 6, 45 L.R.R.M. 1271.

On October 14, 1959, upon consideration of briefs the district court ordered the dismissal of the Company's

declaratory judgment complaint on the ground that it had no jurisdiction over the subject matter. This order is the basis of the present appeal.

The Company's central substantive position is that the denial of inspection of the affidavits in the Board's possession irreparably injured it because of its inability to reply adequately to the charges and the complaint and to prepare fully for the unfair practice hearing. It states that the discovery it seeks is authorized by Rule 34 of the Federal Rules of Civil Procedure, 28 U.S.C.A., and it is noted that Section 10(b) of the Labor-Management Relations Act, 1947, 29 U.S.C.A. §160(b) (the Act), requires that unfair labor practice proceedings "so far as practicable [shall] be conducted in accordance with the rules of evidence applicable in the district courts of the United States." The Company contends that the rules of the Board which allowed the Board to suppress the documents in question here are invalid and unconstitutional. The operation of all these factors, allegedly, deprived the Company of its due process rights to a full and fair proceeding.

The Board answers that the district court had no jurisdiction over the subject matter of this case; that the General Counsel, not joined here, is an indispensable party to the action and therefore the court lacked jurisdiction over the case; and that, in any event, the action and rules attacked here were reasonable and did not deprive the Company of its constitutional rights.

The substantive questions raised by the Company have been at issue in several recent cases before this court,[1]

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[1] E. g., Kiekhaefer Corporation v. National Labor Relations Board, 7 Cir., 1960, 273 F.2d 314; Madden v. International Hod Carriers' Building and Common Laborers' Union of America, Local No. 41, AFL-CIO, 7 Cir., 277 F.2d 688.

but in each of these cases the procedural posture was such that we did not reach the issue. For the reasons explained, infra, again in this case we do not determine the substantive question.

In this and similar actions, parties to Board proceedings have attempted to secure examination of documents in the Board's files. However, in Section 102.94(b), 29 U.S.C.A.App., the Board has found confidential and not available to public inspection all evidence collected by the Board (with limited exceptions discussed, infra) and all files, documents, reports, memoranda and records pertaining to the Board's internal management or to the investigative stage of proceedings. The rule makes provision for inspection upon the permission of the Board, its chairman, the general counsel, or any regional director.[2] Lacking such permission, Board employees are prohibited from producing the files and related documents pursuant to a subpoena *duces tecum* or from testifying as to their contents and are instructed to move to quash such subpoena on the ground that the evidence is privileged against disclosure. See Sections 102.95, 102.31 and 102.66, 29 U.S.C.A.App.

This rule was relaxed subsequent to the decision of the Supreme Court in Jencks v. United States, 1957, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103. The court of appeals, in National Labor Relations Board v. Adhesive Products Corp., 2 Cir., 1958, 258 F.2d 403, applied the Jencks rule to a non-confidential statement sought to be examined in the course of Board proceedings. In turn, the Board, in Ra-Rich Manufacturing Corporation, 121

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[2] The necessity of making such request is emphasized in National Labor Relations Board v. General Armature & Mfg. Co., 3 Cir., 1951, 192 F.2d 316 and National Labor Relations Board v. Jamestown Sterling Corp., 2 Cir., 1954, 211 F.2d 725.

NLRB 700 (1958), reversed its prior position[3] and held that it would adhere to what was, in effect, the Jencks rule to allow examination of a witness's prior statement for the purpose of impeachment.[4] Examination of Board documents, therefore, was limited to Board consent or to a situation where a witness might be impeached by his prior statement.

The Company here, however, asserts that applicable statutes and due process require even more broad rights of examination—discovery not only for impeachment, but also more generally to aid it in the preparation of its case.[5]

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[3] The Great Atlantic and Pacific Tea Company, 118 NLRB 1280 (1957). Cf. National Labor Relations Board v. Thayer Co., 1 Cir., 1954, 213 F.2d 748, 758; National Labor Relatoins Board v. T. W. Phillips Gas & Oil Co., 3 Cir., 1944, 141 F.2d 304, 306.

[4] Section 102.95, 29 U.S.C.A.App., provides:

> "* * * after a witness called by the general counsel has testified in a hearing upon a complaint under section 10(c) of the act the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken."

[5] For the necessity of a party's showing a "need" for the discovery of documents in Board possession, see National Labor Relations Board v. Quest-Shon Mark B. Co., 2 Cir., 1950, 185 F.2d 285, 289-90; Poinsett Lumber and Manufacturing Company, 109 NLRB 1079, 1084 (1954); International Broadcasting Corporation (KWKH), 102 NLRB 1434, 1435-36 (1953); Standard Coil Products, Inc., 99 NLRB 899, 900 (1952). But cf., "There is no provision in the Act authorizing the use of the discovery procedure." National Labor Relations Board v. Globe Wireless, 9 Cir., 1951, 193 F. 2d 748, 751.

We do not reach the resolution of the substantive issue here.[6] We must first determine whether it was proper to raise this issue in a direct action in a district court while Board action was pending or whether the issue, if saved, must properly be considered by the court of appeals in a normal review of Board action as contemplated by Section 10(e) of the Act, 29 U.S.C.A. §160(e).

[1] We hold that the district court properly dismissed the complaint for lack of jurisdiction over the subject matter.

The review provisions of the Act, 29 U.S.C.A. §160(e) and (f), provide adequate and full opportunity for the Company to raise the contentions it tendered in its complaint in the district court. Under the provisions of Section 10(e) of the Act, in an enforcement proceeding the Company may put in issue the question of whether it was deprived of its rights to procedural due process by the Board's action of suppressing the documents in question.

[2] District courts possess general jurisdiction under the provisions of 28 U.S.C.A. §1337 unless the review provisions of the Act destroy it. Leedom v. Kyne, 1958, 358 U.S. 184, 187, 79 S.Ct. 180, 3 L.Ed.2d 210. And in certain instances, a district court's jurisdiction will be invoked, thereby precluding exclusive review by the provisions of the Act. Leedom v. Kyne, supra.[7] However, with full judicial review available upon a petition for

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[6] The constitutional validity of the Board's rule making its documents confidential against general discovery has been affirmed in National Labor Relations Board v. Chambers Manufacturing Corporation, 5 Cir., 1960, 278 F.2d 715 and Biazevich v. Becker, D.C.S.D.Cal.1958, 161 F.Supp. 261. See also Raser Tanning Company v. N.L.R.B., 6 Cir., 1960, 276 F.2d 80.

[7] See discussion of the power of the district court to enforce inter-union contract provisions in N.L.R.B. v. Weyerhaeuser Company, 7 Cir., 1960, 276 F.2d 865, 874-75.

enforcement, the Company has presented no circumstances indicating that it will suffer an irreparable injury which would invoke the power of an equity decree compelling the Board to disclose the documents in question. The sole immediate injury of which the Company has complained is its expense in defending against the unfair labor practice complaint. But, as was stated in Myers v. Bethlehem Shipbuilding Corp., 1938, 303 U.S. 41, 51-52, 58 S.Ct. 459, 464, 82 L.Ed. 638, "the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

The Myers case, supra, is authority for the path we follow here. There, employer-respondent in an unfair labor practice case alleged that its business did not affect commerce and therefore the commerce power of Congress and, in turn, the Board did not extend to its manufacturing operations. Rather than raise this issue before the Board, employer obtained a temporary injunction from a district court restraining Board proceedings. The Supreme Court held that Congress had intended that this jurisdictional fact should first be determined by the Board subject to review by the proper court of appeals; and prior to the exhaustion of the remedies provided by the Act, a district court could not interfere with Board proceedings.

The Company strenuously attempts to distinguish Myers on the ground that Board procedures were not an issue in that case. We agree with this factual distinction. But merely raising a constitutional issue in its

complaint for declaratory judgment, when full appellate review of the administrative proceedings is available and in the absence of any extenuating circumstances, is insufficient to give the district court jurisdiction over the subject matter in the face of the well-established doctrine of exhaustion of administrative remedies. Elm City Broadcasting Corp. v. National Labor Relations Board, D.C.Conn.1954, 123 F.Supp. 838, 840.[8] For cases similar to the instant case, where district courts have refused to intervene in Board proceedings, see N.L.R.B. v. Erkkila, D.C.N.D.Cal., 35 CCH Lab.Cas. ¶71,650 (1958); Biazevich v. Becker, D.C.S.D.Cal.1958, 161 F.Supp. 261; Cf. Thompson Products v. National Labor Relations Board, 6 Cir., 1943, 133 F.2d 637.

[3] We reject the Company's contention that the determination by Madden to file an unfair practice complaint is an adjudication subject to intermediate judicial review under Section 10 of the Administrative Procedure Act, 5 U.S.C.A. §1009. The decision to file such complaint here is an example of the "preliminary, procedural, or intermediate agency action * * * subject to review upon the review of the final agency action." Section 1009(c), supra.

Because of our disposition of the case in the manner described, we do not reach the question of whether the General Counsel is an indispensable party to this action.

The order of the district court dismissing the complaint for declaratory judgment is

Affirmed.

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[8] A district court had jurisdiction to review a certification proceeding where it was alleged that the lack of a hearing unconstitutionally deprived the incumbent union of property rights. There, rights of judicial review were not directly available. Fay v. Douds, 2 Cir., 1949, 172 F.2d 720, 723. Cf. Fitzgerald v. Douds, 2 Cir., 1948, 167 F.2d 714.

APPENDIX II

STATUTES

5 USCA, Section 22

"22. Departmental regulations; withholding of information from public not authorized.

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business and the custody, use and preservation of the records, papers and property appertaining to it. This section does not authorize withholding information from the public or limiting the availability of records to the public. As amended Aug. 12, 1958, Pub. L. 85-619, 72 Stat. 547."

28 USCA, Section 1254

"1254. Courts of Appeals; certiorari; appeal; certified questions.

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

29 USCA, Section 156

"The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter."

29 USCA, Section 160(b)

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor

practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint."

"* * * The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint.

"* * * *Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.*"

29 USCA, Section 160(e)

"(e) The board shall have power to petition any United States Court of Appeals (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which applications may be made are in vacation, any United States district court, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the

proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28."

29 USCA, Sec. 526

"The provisions of the Administrative Procedure Act shall be applicable to the issuance, amendment, or recission of any rules or regulations or any adjudication, authorized or required pursuant to the provisions of this Chapter. Pub L. 86-257, Title VI, para. 606, Sept. 14, 1959, 73 Stat. 540.

"References in Text: 'This Chapter' referred to in the text, was in the original 'this Act' meaning Pub. L. 86-257 which added this chapter and amended sections 153, 158, 159, 160, 164, 186 and 187 of this title.

"(The Administrative Procedure Act, referred to in the text, is classified to Chapter 19 of Title 5, Executive Departments and Government Officers and Employees.)"

APPENDIX III

RULES AND REGULATIONS OF NATIONAL LABOR RELATIONS BOARD

(29 CFR) (29 USCA — APP.)

RULE 101.1

"101.1. By virtue of the authority vested in it by the National Labor Relations Act, 49 Stat. 449, as amended by the Labor Management Relations Act 1947 (Sec. 101, 61 Stat. 136; 28 USCA 151 et seq.) the National Labor Relations Board has issued and caused to be published in the FEDERAL REGISTER simultaneously herewith, Part 102 (Rules and Regulations, Series 5) of this Chapter, which it has found necessary, as provided in section 6 of the National Labor Relations Act, to carry out the provisions of that Act. Part 102 of this Chapter states the general rules of procedure followed by the Board in administering its functions. The following statements of the general course and method by which the Board's functions are channeled and determined, issued and published as provided in sections 3(a) (2) of the Administrative Procedure Act, amplify and supplement the rules of procedure."

RULE 101.4

"101.4. When the charge is received in the Regional Office it is filed, docketed, and assigned a case number. The Regional Director will, on request of the charging party, and may in any case cause a copy of the charge to be served upon the person against whom the charge is made, but timely service of a copy of the charge within the meaning of the proviso to section 10(b) of the act is the exclusive responsibility of the charging party and not of the General Counsel or his agents. The Regional Director requests the person filing the charge to sub-

mit evidence in its support. The person against whom the charge is filed, called the respondent in this part, is asked to submit a written statement of his position in respect to the allegations. The case is then assigned to a member of the field staff for investigation, who interviews representatives of all parties and those persons who have knowledge as to the charges. In the investigation and in all other stages of the proceedings, charges alleging violation of section 8(b)(4)(A),(B), and (C) are given priority over all other cases in the office in which they are pending except cases of like character and charges alleging violation of section 8(b)(4)(D) are given priority over all cases except section 8(b)(4)(A),(B), and (C) cases and other cases alleging violation of section 8(b)(4)(D). After full investigation, the case may be disposed of through informal methods such as withdrawal, dismissal, and settlement; or, the case may necessitate formal methods of disposition. Some of the informal methods of handling unfair labor practice cases will be stated first."

RULE 101.5

"101.5. If investigation reveals that there has been no violation of the National Labor Relations Act, or the evidence is insufficient to substantiate the charge, the regional director recommends withdrawal of the charge by the person who filed. The complainant may also, on its own initiative, request withdrawal. If the complainant accepts the recommendation of the Director or requests withdrawal on its own initiative, the respondent is immediately notified of the withdrawal of the charge."

RULE 101.6

"101.6. If the complainant refuses to withdraw the charge as recommended, the Regional Director dismisses the charge. The Regional Director there-

upon informs the parties of his action, together with a simple statement of the grounds therefor, and the complainant of his right of appeal to the General Counsel in Washington within 10 days. If the complainant appeals to the General Counsel, the entire file in the case is sent to Washington where the case is fully reviewed by the General Counsel with the assistance of his staff. Following such review, the General Counsel may sustain the Regional Director's dismissal, stating the grounds on his affirmance, or may direct the Regional Director to take further action."

RULE 101.7

"101.7. Before any complaint is issued or other formal action taken, the Regional Director affords an opportunity to all parties for the submission and consideration of facts, arguments, offers of settlement or proposals of adjustment, except where time, the nature of the proceeding and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The Regional Office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the Regional Director, provide for the withdrawal of the charge by the complainant at such time as the respondent has complied with the terms of the settlement agreement. Proof of such compliance is obtained by the Regional Director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the Regional Director may determine to institute formal proceedings."

RULE 101.8

"101.8. *If the charge appears to have merit and efforts to dispose of it by informal adjustment are*

unsuccessful, the regional director institutes formal action by issuance of a complaint and notice of hearing. In certain types of cases, involving novel and complex issues, the regional director, at the discretion of the general counsel, must submit the case for advice from the general counsel before issuing complaint. The complaint, which is served on all parties, sets forth the facts upon which the Board bases its jurisdiction and the facts relating to the alleged violations of law by the respondent. The respondent must file an answer to the complaint within 10 days of its receipt, setting forth a statement of its defense."

RULE 102.94

"Files, records, etc., in exclusive custody of Board and not subject to inspection; formal documents and final opinions and orders subject to inspection. (a) The formal documents described as the record in the case or proceeding and defined in sections 102.45, 102.67 and 102.69 are matters of official record and are available for inspection and examination by persons properly and directly concerned, during usual business hours, at the appropriate regional office of the board or in Washington, D. C. as the case may be. True and correct copies thereof will be certified upon submission of such copies a reasonable time in advance of need and payment of lawfully prescribed costs; *Provided, however,* That if the Board, the general counsel, or the regional director with whom the documents are filed shall find in a particular instance good cause why a matter of official record should be kept confidential, such matter shall not be available for public inspection or examination. Application for such inspection, if desired to be made at the Board's office in Washington, D. C. shall be made to the executive secretary or the general counsel, as the case may be, and if desired to be made at any regional office shall be made to the regional director. The executive secretary, the general counsel, or the regional director may, in his discretion,

require that the application be made in writing and under oath and set forth the facts upon which the applicant relies to show that he is properly and directly concerned with such inspection and examination. Should the executive secretary, the general counsel, or the regional director, as the case may be, deny any such application, he shall give prompt notice thereof, accompanied by a simple statement of procedural or other grounds.

"(b) All final opinions or orders of the Board in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and its Rules and Regulations are available to public inspection during regular business hours at the Board's offices in Washington, D. C. Copies may be obtained upon request made to any regional office of the Board at its address as published in the Federal Register, or to the director of information in Washington, D. C. Subject to the provisions of sections 102.31 and 102.66 all files, documents, reports, memoranda and records pertaining to the internal management of the Board or to the investigation or disposition of charges or petitions during the nonpublic investigative stages of proceedings and before the institution of formal proceedings, and all matters of evidence obtained by the Board or any of its agents in the course of investigation, which have not been offered in evidence at a hearing before a trial examiner or hearing officer or have not been made part of an official record by stipulation, whether in the regional offices of the Board or in its principal office in the District of Columbia, are for good cause found by the Board held confidential and are not matters of official record or available to public inspection, unless permitted by the Board, its chairman, the general counsel, or any regional director.

RULE 102.95

"Same; Board employees prohibited from producing files, records, etc., pursuant to subpoena and

testificandum or subpoena duces tecum, prohibited from testifying in regard thereto. No regional director, field examiner, trial examiner, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, Territory, or the District of Columbia with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board, whether in answer to a subpoena, *subpoena duces tecum,* or otherwise, without the written consent of the Board or the chairman of the Board if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel. Whenever any *subpoena ad testificandum* or *subpoena duces tecum,* the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served upon any such persons or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this rule:— *Provided* after a witness called by the general counsel has testified in a hearing upon a complaint under Section 10 (c) of the Act the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise

approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken.

FOOTNOTE TO SECTION 101.4

GENERAL SERVICES ADMINISTRATION

June 23, 1960

This is in reply to your telegram relating to 29 CFR 101.4.

29 CFR 101.4 was issued as 29 CFR 202.4 effective August 22, 1947. See the Federal Register of August 22, 1947 (12 F.R. 5651).

The section was renumbered but not amended in the Federal Register of January 6, 1949 (14 F.R. 78).

The section was amended effective February 16, 1959. See the Federal Register of February 12, 1959 (24 F.R. 1096), a copy of which is enclosed.

The section was again amended effective November 13, 1959. See the Federal Register of November 7, 1959 (24 F.R. 9096), a copy also enclosed.

There have been no further amendments to the section as of today's date.

The Federal Register and Code of Federal Regulations are available for examination at the Milwaukee Public Library and the Law Library of Milwaukee County.

Sincerely yours

/s/ D. C. Eberhart
D. C. Eberhart

Director

Office of the Federal Register

APPENDIX IV

FEDERAL RULES OF CIVIL PROCEDURE (28 USCA)

RULE 12. Defenses and Objections.

"Rule 12 (b). How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses, or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.

"Rule 12 (c). Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

"Rule 12 (d). Preliminary hearings. The defenses specifically enumerated (1) - (6) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

"Rule 12 (g). Consolidation of Motions. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except that prior to making any other motions under this rule he may make a motion in which the joined all the defenses numbered (1) to (5) in subdivision (b) of this rule which he cares to assert.

"Rule 12 (h). Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received."

RULE 34

Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.

"Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and

copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b), and which are in his possession, custody or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26 (b). The order shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. As amended Dec. 27, 1946, effective March 19, 1948."

APPENDIX V

U. S. CONSTITUTION — AMENDMENT V

* * * "No person shall be * * * deprived of life, liberty or property without due process of law;" * * *

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No. 155

In the Supreme Court of the United States

OCTOBER TERM, 1961

VAPOR BLAST MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court below (Pet. 3a–12a) is reported at 287 F. 2d 402. The Board's decision and order are reported at 126 NLRB 74 (B.A. 2–13).[1]

JURISDICTION

The opinion of the court of appeals was issued on February 28, 1961 (Pet. 3a), and on the same day a judgment was entered implementing that opinion (Appendix, pp. 8–9, *infra*). A formal decree was entered on March 20, 1961 (Pet. 1a–2a). The petition for a writ of certiorari was filed on June 16, 1961.

[1] "B.A." references are to the Board's Appendix filed in the court of appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petition for certiorari was filed within the ninety-day period prescribed in 28 U.S.C. 2101(c).

2. Whether, in the circumstances of this case, the petitioner was prejudiced by the Board's denial of access to witnesses' pre-trial statements until after they had testified at the hearing.

STATUTES INVOLVED

The relevant statutory provisions and Board Rules and Regulations are set forth in the petition (Pet. 23a–36a).

STATEMENT

A. THE BOARD PROCEEDING

The Board found that the petitioner, an employer, had violated the Act by interrogating an employee as to his union membersip; by undermining and refusing to recognize an independent union, while encouraging employees to join the Auto Workers and thereafter signing a contract with it; by discharging employees because of activity protected by Section 7 of the Act; and by refusing to bargain with the Independent. The Board entered an appropriate order, remedying these violations. (B.A. 2–13.)

Before the Board, the petitioner asserted that it was denied a fair hearing by virtue of being denied access to the pretrial statements of certain Board witnesses. The Board found no merit to this conten-

tion (B.A. 3). The facts relating to the matter are as follows:

After the unfair labor practice charges were filed with the Board, the Company requested copies of the statements obtained from the charging parties and other witnesses by Board investigators. The General Counsel declined to produce the statements before hearing, and, at the outset of the hearing, the Trial Examiner quashed subpenas which would have required their production before the General Counsel began his case (B.A. 44, 124–127).[2] As the hearing proceeded, the General Counsel put on 13 witnesses other than Company officials. The Company did not request the statements of the first six of these witnesses, three of whom were charging parties (B.A. 49, 50, 60, 74, 75). Three of the remaining witnesses had given pretrial statements, and the Company requested them after the witness had testified, which request was complied with by the General Counsel (B.A. 79–80, 82, 83–84, 85, 86, 91). The Company counsel was afforded an opportunity to examine the affidavits before continuing his cross-examination and did not request additional time (B.A. 80, 82–83, 91). When the General Counsel closed his part of the case, the Company counsel announced that he was ready to proceed and immediately put on the Company's first witness without requesting a recess (B.A. 91).

[2] These rulings were in compliance with Section 102.95, Board Rules and Regulations (Pet. 31a–33a), which restricts production until the witness giving the statement has testified. See *Ra-Rich Mfg. Corp.*, 121 NLRB 700, 701.

B. THE DECISION OF THE COURT OF APPEALS

The court below upheld the Board's unfair labor practice findings as supported by substantial evidence and specifically upheld its procedure with respect to the disclosure of the affidavits. It accordingly enforced the Board's order in full (Pet. 3a–12a).

ARGUMENT

1. The judgment of the court of appeals enforcing the Board's order was entered on February 28, 1961 (Appendix, pp. 8–9, *infra*), the same day that the court issued its opinion (Pet. 3a). The petition for certiorari, however, was not filed until June 16, 1961, more than 90 days after the entry of the judgment. Although a decree was entered after the judgment (Pet. 1a-2a), it did not change any matter of substance or resolve any genuine ambiguity in the judgment of February 28. The decree did not revise legal rights and obligations, but was merely a ministerial formalization of the decision of February 28. Accordingly, under *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, the petition is untimely.

2. No question warranting review by this court is presented by the petitioner's contention (Pet. 12–13) that the Board's rule, restricting access to a witness' pretrial statement until after he has testified, is invalid.[3] From the facts set forth at p. 3, *supra*, it is

[3] The petitioner sought to raise the same issue by a direct action in the district court while the present proceedings were pending before the Board. The court below affirmed the dismissal of that action by the district court (Pet. 13a–22a) because of the petitioner's failure to exhaust its administrative

clear that the petitioner suffered no prejudice from application of the rule in this case. At the hearing, the General Counsel produced those statements which the petitioner requested, and the petitioner was afforded an opportunity to examine the affidavits before continuing his cross-examination. The petitioner did not even suggest that it needed more time either to prepare for cross-examination or to prepare its defense in the light of the testimony of the General Counsel's witnesses. Under these circumstances, as the court below properly concluded, the petitioner can hardly claim that presentation of its case was affected by the refusal to make the statements available earlier.[4]

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remedies. *Vapor Blast Manufacturing Co.* v. *Madden*, 280 F. 2d 205 (C.A. 7), certiorari denied, 364 U.S. 910.

[4] There is no substance to the petitioner's contention (Pet. 2, 13–20) that it was improperly deprived of an opportunity to inspect the membership cards, constitution, and by-laws of the Independent. At the pre-hearing stage of the case, the petitioner made a blanket demand upon the Regional Director for inspection of the entire investigative file. When this request was denied, the petitioner sought the issuance of subpoenas to compel the production of "All of the records of investigation and reports of investigation" (B.A. 124–127), which subpoenas were quashed by the trial examiner at the hearing (B.A. 44, 124–127). Both of these requests were so broad that they were properly denied. At no subsequent stage of the Board proceeding, or even in the suit to enjoin that proceeding (see Pet. 15a–17a), did the petitioner specifically mention the documents relating to the Independent or that it was prejudiced by a failure to see them. The main thrust of the petitioner's procedural contention throughout the proceedings has been directed at the refusal to permit inspection of the affidavits of witnesses before the hearing. In any event, the normal manner in which an employer undertakes to satisfy himself as to a union's majority status is to request verification from the union